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Supreme Court of the United States

TEXAS,

Petitioner,

v.

RAYMOND LEVI COBB,

Respondent.

On Writ of Certiorari to the Texas Court of Criminal Appeals

PETITIONER'S REPLY BRIEF

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ARGUMENT

This case presents two different visions of the Sixth Amendment right to counsel. According to Cobb, the Sixth Amendment forbids police from questioning an accused outside his lawyer's presence not only about offenses charged in an indictment, but also about all other offenses that occurred at the same time as the charged offense.[1] By contrast, Texas believes that the Sixth Amendment only reaches offenses for which a defendant has been formally accused "by way of formal charge, preliminary hearing, indictment, information, or arraignment," *Kirby v. Illinois*, 406 U.S. 682, 689 (1972), and that a defendant must rely on Fifth Amendment guarantees to shield him from questioning about other offenses—including those arising from the same transaction as the charged offense.[2] Unlike Cobb's position, Texas's position is supported by the text and purposes of the Sixth Amendment, and by this Court's jurisprudence.

I. THE SIXTH AMENDMENT RIGHT TO COUNSEL PROTECTS AN ACCUSED ONLY AS TO A CHARGED OFFENSE.

Cobb and his *amici* contend that the Sixth Amendment right to counsel has more than one trigger. They accept the familiar rule that an indictment activates the right to counsel as to the offenses charged. But, going further, they argue that formation of the attorney-client relationship also triggers the Sixth Amendment as to offenses—as yet uncharged—that arise from the same transaction as a charged offense. *See, e.g.*, Defense amici, at 12-18. They unjustifiably warn that, without this additional rule, attorneys will be unable to defend their clients, because the police will exploit unfettered access

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[1] *See, e.g.*, Respondent's Brief, at 11-14; Brief of Amici Curiae the National Association of Criminal Defense Lawyers and the National Legal Aid and Defender Association (Defense amici), at 12-20.

[2] *See, e.g.*, Petitioner's Brief, at 20-30.

to uncounseled defendants and will wring confessions from them at will. *See, e.g.*, Defense amici, at 14-15. Nothing could be further from the truth. Bringing charges against an individual invokes a variety of constitutional protections. But charging a defendant with one crime while the police continue to investigate another factually related but uncharged crime does not deny the defendant the guidance of counsel nor otherwise put him at a disadvantage. If anything, it disadvantages the police by ensuring that a previously unrepresented defendant will have the benefit of counsel, not only for the charged offense which the Sixth Amendment protects, but also as a practical matter for the uncharged offense. In any event, Cobb's view of Sixth Amendment attachment was rejected by the Court over a decade ago. *See Moran v. Burbine*, 475 U.S. 412, 429-30 (1986).

A. The Court Has Consistently Interpreted the Right to Counsel as Extending Only to Charged Offenses.

The Sixth Amendment reserves its cluster of rights only for "criminal prosecutions."[3] The text refers to a distinct procedural event, *i.e.*, to "an action or proceeding instituted in a proper court on behalf of the public, for the purpose of securing the conviction and punishment of one accused of crime." BLACK'S LAW DICTIONARY 374 (6th ed. 1990). That language, combined with the amendment's references to the "accused" and the "accusation," confirms that Sixth

[3] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

Amendment rights are "accusation-based." AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 102-03, 139 (1997). Its promises accrue only when the government "accuses" by initiating a "criminal prosecution." *Id.*, at 102-03.

The Court has reinforced this reading by consistently holding that the Sixth Amendment right to counsel is triggered only by "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby*, 406 U.S., at 689; *see McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (quoting *Kirby*). This rule is "far from a mere formalism" because "it is only then that the government has *committed* itself to prosecute, and only then that the adverse positions of the government and defendant have *solidified*." *Kirby*, 406 U.S., at 689-90 (emphasis added). Indeed, this line of demarcation is "*fundamental* to the proper application of the Sixth Amendment right to counsel." *Moran*, 475 U.S., at 431 (emphasis added). Consequently, "[w]hen the suspect is not yet 'accused' in the constitutional sense, the sixth amendment bestows no protection whatsoever." H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1156 (1987).[4]

Thus, only when the criminal prosecution reaches a certain procedural stage—one where the positions of government and defendant have "solidified"—do Sixth Amendment rights begin to flower. *Kirby*, 406 U.S., at 690. The Court's use of the words "solidified" and "committed" implies that there are investigatory phases leading up to a prosecution to which the

[4] *See also id.*, at 1164 ("[T]he offer of the sixth amendment remains dormant until the actual commencement of legal proceedings against [a defendant]. By its terms, and by consistent judicial reading, the constitutional guarantee of counsel accrues only to the charged defendant.").

Sixth Amendment does not apply. *See, e.g., Moran*, 475 U.S., at 429-30. To be sure, *other* constitutional guarantees may come into play. For instance, if a suspect is arrested and interrogated, he is entitled to an array of procedural safeguards arising from the Fifth Amendment ban on self-incrimination. *See, e.g., Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). And, of course, a pre-indictment suspect may hire an attorney and be advised how to deal with the police in the event he is questioned. But the *constitutional* right to counsel does not arise until the government formalizes its intent to prosecute.

Against this backdrop, *McNeil* articulated what was already implicit in the Court's jurisprudence—that the Sixth Amendment right to counsel, and its prophylactic counterpart, are "offense specific." 501 U.S., at 175; *see Michigan v. Jackson*, 475 U.S. 625, 636 (1986). That is, their protection is only as broad as the formal criminal proceedings that give them life. *See* Petitioner's Brief, at 11, 21. Thus, a charged offense would be covered by the Sixth Amendment, while an uncharged offense—even a "new or additional crime" committed by the defendant under indictment—would not. *See Maine v. Moulton*, 474 U.S. 159, 180 & n.16 (1985).

B. The Breadth of the Attorney-Client Relationship Cannot Describe an Accused's Constitutional Right to Counsel.

Cobb and his *amici* propose an additional rule of Sixth Amendment attachment. In their view, the attorney-client relationship itself causes the *constitutional* right to counsel to attach to offenses that have not been charged, but that arise from the same factual transaction as a charged offense. *See, e.g.*, Respondent's Brief, at 11; Defense amici, at 14-16. Without this "same transaction" rule, they argue, the police will have unfair access to criminal defendants and their attorneys will be unable to defend them adequately. *See*

Respondent's Brief, at 11-14; Defense amici, at 29. The rule is supposedly grounded in the "lay impressions" of criminal defendants, in the practical necessities of defense counsel, and in the typically coordinated nature of police investigations. Defense amici, at 14-15. *Amici* cite a number of circuit and state cases as support for the rule, and their primary authority in this Court's jurisprudence appears to be *Moulton*'s statement that the Sixth Amendment "guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." Defense amici, at 7 (quoting *Moulton*, 474 U.S., at 176).

But as explained above, none of the Court's precedents tie attachment of the right to counsel to the formation of the attorney-client relationship. Instead, the cases uniformly peg attachment on reaching a definite procedural stage—the "initiation of adversary judicial criminal proceedings." *See Kirby*, 406 U.S., at 689. *Moulton*'s observation that an accused can rely on counsel as a "medium" simply describes the role of counsel once adversary criminal proceedings have begun. *See* 474 U.S., at 176. In no sense does *Moulton* redefine the point at which the constitutional right to counsel attaches.

The Court rejected Cobb's expanded attachment argument fourteen years ago. In *Moran*, the Court considered whether formation of the attorney-client relationship itself triggered the Sixth Amendment right to counsel. 475 U.S., at 428-29. The defendant argued that the Sixth Amendment should protect the "integrity of the attorney-client relationship" regardless of the stage of the proceedings and that the Sixth Amendment ensures "the right to noninterference with an attorney's dealings with a criminal suspect." *Id.* The Court rejected these notions, explaining that the defendant's argument

> "misconceives the underlying purpose of the right to counsel. The Sixth Amendment's intended function is

> not to wrap a protective cloak around the attorney-client relationship any more than it is to protect a suspect from the consequences of his own candor. Its purpose, rather, is to assure that in any 'criminal prosecutio[n],' U.S. CONST. Amdt. 6, the accused shall not be left to his own devices in facing the prosecutorial forces of organized society." 475 U.S., at 430 (citations omitted).

Moreover, the Court rejected the notion that *Moulton* supports this "attorney-client" rule of attachment. 475 U.S., at 431 ("[B]ecause Moulton already had legal representation, the decision all but forecloses respondent's argument that the attorney-client relationship itself triggers the Sixth Amendment right."). The Court has since confirmed these principles by stating, in *Michigan v. Harvey*, that "nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of counsel." 494 U.S. 344, 352 (1990).

In arguing that the right to counsel extends to an entire transaction, *amici* seriously misread the "offense specific" requirement of *McNeil*. Defense amici, at 13. *Amici* admit that *McNeil* interprets a defendant's request for counsel at arraignment as indicating that he "might be willing to speak to the police without counsel present concerning many matters, *but not the matter under prosecution*." *Id.* (quoting *McNeil*, 501 U.S., at 178) (emphasis added). But instead of taking this statement at face value, *amici* construe it as a gloss on what "offense specific" means. Namely, they believe that "offense specificity" must take into account an accused's subjective perceptions about how far his request for counsel extends. Thus, *amici* contend " 'offense specific' . . . mean[s] only that the crime about which the state wishes to question [the defendant] is unlikely to be *totally immaterial* to the defendant's determination of whether he needs the guiding hand of counsel." Defense amici, at 13 (emphasis in original). *Amici* have turned *McNeil* on its head.

Their principal error lies in the belief that "offense specific" refers to a defendant's *invocation* of the right to counsel. *Id.* *McNeil* does not say that. Instead, *McNeil* emphasizes it is the *Sixth Amendment right to counsel* that is "offense specific":

> "The Sixth Amendment right [to counsel] . . . is offense specific. It cannot be invoked once for all future prosecutions, for its does not attach until a prosecution is commenced . . . . And just as the right is offense specific, so also its *Michigan v. Jackson* effect of invalidating subsequent waivers in police-initiated interviews is offense specific." 501 U.S., at 175 (citations omitted).

McNeil then links the content of the phrase "offense specific" to the objective, verifiable offense under indictment, and *not* to anything as malleable as an accused's secret, subjective belief about what his invocation meant to cover. *See id.*, at 175-76 (quoting *Moulton*, 474 U.S., at 180 & n.16; citing *Moran*, 475 U.S., at 431); *see* Petitioner's Brief, at 21. Contrary to *amici*'s argument, *McNeil* discussed the accused's probable state of mind merely to emphasize that his Sixth Amendment request for counsel is, as a factual matter, not equivalent to a Fifth Amendment request. 501 U.S., at 178.

Expanding on their misreading of *McNeil*, *amici* speculate about the possible contours of "offense specificity." First, they would expansively rely on the accused's "lay impression" that his request for counsel covers the entire factual transaction and not just the crime for which he has been indicted. Defense amici, at 13-14. But defining the scope of the Sixth Amendment's protections in subjective terms would be disastrous and utterly unworkable. An investigating officer can objectively understand the prophylactic scope of a Fifth Amendment *Edwards* invocation and, once an accused is charged with a particular

crime, an officer can understand a Sixth Amendment invocation objectively defined by the scope of the charge. But any expansion of the scope of the Sixth Amendment invocation unnecessarily forces a subjective determination, and *amici*'s proposition would require an investigator to undertake the impossible task of determining the accused's subjective state of mind before attempting to interrogate him. That radical assertion has no support in the text of the amendment, the Court's Sixth Amendment precedent, or logic. So interpreted, the Sixth Amendment would become nothing more than a charter for criminal evasion.[5]

Second, Cobb and *amici* warn that a charged-offense rule will hamstring defense attorneys' ability to effectively represent their clients as to factually-related but uncharged crimes. Respondent's Brief, at 12-13; Defense amici, at 14-15. This argument again confuses the scope of the attorney-client relationship with the scope of the constitutional right to counsel. The Sixth Amendment does not constitutionalize the attorney-client relationship; rather, it entitles an accused to rely on counsel's aid in defending against a criminal charge. *Moran*, 475 U.S., at 429-30; *Moulton*, 474 U.S., at 180 & n.16.[6] But in effectively representing a client, defense

[5] Contrary to *amici*'s arguments, the charged-offense rule demands no deep legal "sophistication" from criminal defendants. *Id.*, at 14. The rule requires that an accused merely be able to understand the nature of the charges. Cobb surely understood that the burglary charge to which he had confessed did not encompass the murders for which he was ultimately convicted. *See* Petitioner's Brief, at 23-24.

[6] *Amici*'s invocation of the ABA's "no-contact" rule, Defense amici, at 29 n.8, is a red herring. This Court has never indicated that ethical recommendations should govern the contours of the Sixth Amendment, and has in fact strongly suggested to the contrary. *See Moran*, 475 U.S., at 427-28 (rejecting as constitutional standards the "subconstitutional recommendations" of the ABA); *United States v. Henry*, 447 U.S. 264, 275 n.14 (1980) (indicating that DR 7-104(a)(1) "does not bear on the constitutional question in this case"). *See generally*, Frank O. Bowman, III, *A Bludgeon by Any Other Name: The Misuse of "Ethical Rules" Against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665, 732-33 (1996); Uviller, *supra*, at 1176-83.

counsel undoubtedly will consider the possibility that the client may be more of a criminal than initially thought. Counsel may also urge a client to disclose the full extent of his criminal liability for the transaction in question. And counsel may advise a client that, if questioned by police about the yet-uncharged offenses, he should end the interview immediately by invoking his (Fifth Amendment) right to counsel. Thus, the charged-offense rule cannot *prevent* a lawyer from "guiding" his accused client as to police investigations of related but uncharged crimes. *See, e.g.*, Defense amici, at 15. But the Sixth Amendment will not assist in that endeavor until his client is actually indicted for those crimes.[7]

Amici wrongly suggest that this is a "textbook" case for applying some form of "same transaction" or "closely related" exception to *McNeil*. Defense amici, at 16. The assertion that Ridley "behaved as though his attorney-client relationship with Cobb extended to all same transaction charges" sorely misrepresents the record. *See* Petitioner's Brief, at 2-3, 6-7, 29, 45-46; *see infra* Part III.B. Further, Texas has always conceded that the police believed all along that Cobb knew something about the disappearances. *See, e.g.*, Petitioner's Brief, at 3, 29, 46 n.10. But the police's subjective suspicions cannot influence either attachment of the right to counsel or its scope. Even if the police and Ridley assumed there was a pre-existing attorney-client relationship covering the murder investigation, that merely

[7] *Amici* illogically suggest that the coordinated nature of police investigations should also influence the scope of an accused's right to counsel. Defense amici, at 15-16. But, again, the scope of the right depends on the offense charged and not on the degree of police "cooperation" among different investigations.

begs the question whether the attorney-client relationship describes the scope of the Sixth Amendment right to counsel. The Court's precedents answer that question with a definitive "no." *See McNeil*, 501 U.S., at 175-76; *Moran*, 475 U.S, at 429-30; *Moulton*, 474 U.S., at 180 & n.16.

The expansive attachment rule urged by Cobb and his *amici* would transform the Sixth Amendment into a device for outlawing voluntary confession to crime. It would place an attorney at the defendant's elbow, even if he did not ask for one, during any interrogation concerning a crime even remotely related to a previously charged offense. The plain result—given that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances"—would be to muzzle confessions altogether. *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part).[8] This would be a strange and destructive interpretation of the constitutional right to counsel, particularly in light of the Court's recent statement that "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good." *McNeil*, 501 U.S., at 181.

II. THE *BLOCKBURGER* COROLLARY APPLIES BY ANALOGY TO THE OFFENSE-SPECIFIC RIGHT TO COUNSEL.

Cobb and his *amici*'s attack on application of the charged-offense rule and a "same elements" *Blockburger* corollary to measure the extent of the Sixth Amendment right to counsel, Respondent's Brief, at 27-34; Defense amici, at 20-29, misapprehends Texas's position, the record, or both. The charged-offense rule arises directly from this Court's

[8] *See also* Uviller, *supra*, at 1161 ("To hold that an accused defendant shall not be interrogated, or even given the opportunity to speak to the police . . . except with a lawyer on hand, is simply to direct that they shall not be heard to speak their minds, period.").

consistent interpretation of the Sixth Amendment right to counsel. The same-elements corollary, which mirrors the familiar *Blockburger* double jeopardy test, simply reinforces the charged-offense rule. *See* Petitioner's Brief, at 26; *Blockburger v. United States*, 284 U.S. 299, 304 (1932). The corollary would *protect* criminal defendants against mechanical circumvention of Sixth Amendment attachment. Moreover, its application to this case is fair, contrary to *amici*'s distortion of the undisputed record.

Amici attempt to establish textually that the gulf between the Fifth Amendment phrase "same offense" and the Sixth Amendment phrase "criminal prosecution" forecloses analogy between the two. Defense amici, at 20-21. Without citing a single authority, *amici* conclude that the "narrower" provisions of double jeopardy are inapposite to the "broader" Sixth Amendment provisions. *Id.* Had *amici* consulted a dictionary, they would have discovered that the two phrases share close kinship. "Offense" means, among other things, the "violation of law for which *penalty* is prescribed," and, specifically in the double jeopardy context, "the term means the same *crime* . . . ." BLACK'S LAW DICTIONARY 1081 (6th ed. 1990) (emphasis added). Similarly, "prosecution" refers to "a proceeding instituted and carried on by due course of law . . . for the purpose of determining the guilt or innocence of a person charged with *crime*." *Id.*, at 1221 (emphasis added). These definitions confirm what common sense suggests: an "offense" and a "prosecution" both center around a particular "crime." But more importantly, this Court has described the scope of the Sixth Amendment right to counsel as "offense specific" precisely because its attachment depends on the formal initiation of a "criminal proceeding." *McNeil*, 501 U.S., at 175-76. Text, context, and precedent thus reveal closer ties between the two clauses than *amici* wish to admit.

Amici's argument that precedent forbids cross-pollination between the clauses focuses on *Moulton* and *Brewer v. Williams*, 430 U.S. 387 (1977). They contend that both cases preclude a charged-offense or a same-elements rule because in each the Court, finding right-to-counsel violations, reversed not only charged offenses but also factually related, uncharged offenses. Defense amici, at 21-22. In its opening brief, Texas examined these cases at length, Petitioner's Brief, at 14-19 (*Moulton*); 19-20 (*Brewer*), and showed that (1) neither case addressed the relatedness issue, (2) the state neither raised nor briefed the issue in either case and even conceded Sixth Amendment attachment in *Brewer*, and (3) there were alternative explanations for reversal of the uncharged offenses. *See also* Brief of Amicus Curiae United States, at 19-24. Contrary to *amici*'s implicit assertion, Texas does not contend that *Brewer* and *Moulton* were wrongly decided. Rather, the lengthy treatment in Texas's brief reveals that its argument was, instead, that lower courts have read these cases for propositions they do not contain. *See, e.g.*, Petitioner's Brief, at 20.

Amici also draw inapt distinctions between the respective "purposes" and "interests" served by the double jeopardy and right to counsel clauses. Defense amici, at 24-25. It is unclear what pertinent difference there is between the purpose of double jeopardy (avoiding "successive prosecutions and . . . multiple punishments for the same offense") and the right to counsel (protecting an unaided defendant "at critical confrontations with his adversary"), at least regarding the definition of "offense." *Id.* The textual differences between the clauses are negligible now that *McNeil* has explicitly linked a Sixth Amendment "criminal proceeding" with a specific offense. 501 U.S., at 175-76. But in any event, to prove the alleged contrast *amici* must grossly overstate the interest protected by the Sixth Amendment. According to *amici*, that interest is "in having an expert assist [an accused] in all dealings with a sophisticated and committed adversary."

Defense amici, at 25. But this description far exceeds the narrower, charge-limited focus of the constitutional right to counsel found in *McNeil*, *Moran*, and *Moulton*.

Without any textual, precedential, or policy reasons to support their Sixth Amendment interpretation, *amici* improperly hypothesize that the police manipulated the murder investigation in order to deprive Cobb of his attorney's guidance. But contrary to *amici*'s assertion, the record contains not even the slightest hint of police manipulation. Walker County detective Judy James became involved in this case in January 1995, long after Cobb had confessed to the burglary. R.2.207. She met Cobb's appointed counsel, Ridley, in September 1995, when Cobb appeared in Huntsville to plead on the burglary charge. R.2.211-12. At that time, Ridley told James that he did not object to her talking to Cobb about the disappearances, although nothing came of the subsequent interview. R.2.212-17.

In early November 1995, Cobb's stepmother Deborah left a telephone message with the Walker County District Attorney's Office. R.2.218. The message was given to James, who called Deborah back. R.2.218-19. Deborah asked James to speak to Charles (Cobb's father), who told James that he was worried about Cobb and "wanted to know what he could do to help his son." R.2.220. James testified: "I told him if he wanted to help him, that he would have his son call me and tell me the truth; that Raymond needed to tell the truth." R.221; *see* R.2.269. Cobb never called James, but three days later Charles did, informing James that his son had implicated himself in the murders. R.2.222-23. Charles also told James that she should "get a warrant for Raymond because he stated that he would be leaving there in the morning." R.2.224.

The undisputed events that led to Cobb's arrest and confession to the murders show, not that the police manipulated the charges and the investigations to deprive Cobb of his right to counsel, but rather that they carefully

observed every safeguard to ensure both that they would secure the needed evidence, but also that they would be able to use it.

Finally, *amici*'s hypotheticals, purporting to demonstrate the "bizarre consequences" of applying Texas's attachment rule, Defense amici, at 28, do not articulate any legitimate harm that will result from applying Texas's rule. The only harm *amici* identify reveals their flawed conception of the breadth of the constitutional right to counsel. *Amici* hypothesize—without mentioning the broader Fifth Amendment protections—that a suspect's constitutional right to counsel is violated when, for instance, police question a suspect charged with statutory rape about a possible forcible rape offense, or a suspect charged with grand larceny about a possible robbery offense. Defense amici, at 28. But *amici* do not and cannot assert that failure to apply the Sixth Amendment to these hypothetical situations will deprive a suspect of the guidance of counsel, because a suspect faced with custodial interrogation may cut off questioning—and obtain counsel's aid—as to *any* subject simply by invoking his right to counsel under *Edwards*. *See, e.g.*, Petitioner's Brief, at 23-24. Neither Cobb nor his *amici* have ever addressed that overarching protection in protesting that criminal defendants will not be adequately protected without an expansive interpretation of "criminal proceeding."

The Sixth Amendment does not constitutionalize the attorney-client relationship, but ensures only that an accused may rely on counsel's advice in defending against a particular criminal charge. This is a narrower but far more balanced and manageable scope than *amici* propose. And, contrary to Cobb's and *amici*'s fears, *see* Respondent's Brief, at 28; Defense amici, at 29, its application is simple, depending only upon the substance of the charge that formally begins a "criminal proceeding." U.S. CONST. amend. VI.

III. COBB IS NOT ENTITLED TO THE PROTECTION OF *MICHIGAN v. JACKSON*.

A. *Jackson* Should Be Overruled.

Amici do not address Texas's argument that *Jackson* should be overruled. Petitioner's Brief, at 33-40. In his brief, however, Cobb wrongly asserts that Texas is, in effect, asking the Court to fundamentally alter its last quarter century of Sixth Amendment jurisprudence. Respondent's Brief, at 40-46. Cobb has overstated Texas's position.

Jackson is simply not woven into this Court's Sixth Amendment case law. Rather, it is an unwarranted extension of the *Edwards* rule outside the confines of custodial interrogation into a context where the rule makes no sense. Petitioner's Brief, at 34-35. In the fourteen years since it was decided, the Court has not revisited or expanded *Jackson*, but has, in fact, only limited its application. *See Harvey*, 494 U.S., at 350-54.

Since *Jackson* was decided, the Court has abandoned the already tenuous premises supporting the decision. Petitioner's Brief, at 36-38. *Patterson v. Illinois* clarifies that the state's decision to begin criminal proceedings does not perceptibly increase an accused's need for counsel during questioning. 487 U.S. 285, 298-99 (1988). *Davis* holds that an *Edwards* assertion—the Fifth Amendment equivalent to, and source of, a *Jackson* assertion—must be an unambiguous request for counsel's aid during custodial interrogation. *Davis v. United States*, 512 U.S. 452, 459 (1994). Neither the content nor the context of an accused's request for counsel at an arraignment or similar proceeding approaches the *Davis* standard of clarity. *See McNeil*, 501 U.S., at 178. Finally, *McNeil* completes the Court's abandonment of *Jackson*'s premises by holding that a defendant's Sixth Amendment request for counsel is not, as a matter of fact or policy, an invocation of his Fifth Amendment right to counsel. 501 U.S., at 177-81.

There is no longer any basis in the Court's cases for interpreting an accused's request for counsel at arraignment as the clear expression of a desire for counsel during questioning. The logical and practical underpinnings of *Jackson* have therefore evaporated.

Overruling *Jackson* will not only leave the rest of the Court's Sixth Amendment precedents unaffected but will also have no real effect on an accused's ability to cope with custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436, 467 (1966). An uncounseled accused who wishes to cut off questioning on *any* subject need only say four words, "I want my lawyer," and the Fifth Amendment will shield him from further police-initiated interrogation. *See Arizona v. Roberson*, 486 U.S. 675, 680-81 (1988); *Edwards*, 451 U.S., at 484. Neither Cobb nor his *amici* have ever explained why these broader Fifth Amendment safeguards do not accomplish what *Jackson* promises. Because the Fifth Amendment and *Edwards* adequately shield an accused from unwanted interrogation, "there simply is no room or need for an awkward adaptation of a further constitutional limitation such as the counsel clause of the sixth amendment." Uviller, *supra*, at 1154.

Jackson should be overruled.

B. Cobb Never Asserted His Right to Counsel.

Cobb and *amici* argue that Cobb invoked his right to counsel under *Michigan v. Jackson* by accepting appointed counsel on the burglary charge. *See* Defense amici, at 7-8. But mere acceptance of appointed counsel without more is insufficient to trigger *Jackson*'s heightened protection. *See* Petitioner's Brief, at 43-44. *Jackson* is triggered only by a defendant's affirmative, clear, and unambiguous request for

counsel, *id.*, at 43,[9] and simply accepting appointed counsel does not rise to that level of clarity.

No decision of this Court supports Cobb's argument. *Amici*'s claim that footnote 3 in *Patterson*, 487 U.S., at 290 n.3, shows that acceptance of appointed counsel activates *Jackson*, is unsupportable. Defense amici, at 8.[10] The accused in *Patterson* had been indicted but had not requested counsel. 487 U.S., at 290-91. Because the accused "at no time sought to exercise his right to have counsel present," the Court found *Jackson* inapplicable. *Id.*, at 291. The Court emphasized that "[o]ur decision in *Jackson* . . . turned on the fact that the accused 'ha[d] asked for the help of a lawyer' in dealing with the police." *Id.* (quoting *Jackson*, 475 U.S., at 631, 633-35).

Patterson accepted the established rule that the accused was entitled to assistance of counsel at postindictment interviews. 487 U.S., at 290. But the Court added the following footnote to its discussion:

> "We note as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect. [citing *Moulton*, 474 U.S., at 176]. The State conceded as much at oral argument. Indeed, the analysis changes

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[9] Cobb repeatedly asserts that he did, in fact, request counsel. *See* Respondent's Brief, at 23, 24, 44. But this alleged request appears nowhere in the record, as Texas specifically pointed out in its merits brief and its certiorari petition. *See* Petitioner's Brief, at 40; Pet. for Cert., at 20. Cobb did not address this factual contention in his opposition to Texas's petition and has therefore waived any objection to it. SUP. CT. R. 15(2).

[10] *Patterson* held that *Miranda* warnings would support waiver of an accused's Sixth Amendment right to counsel during postindictment questioning. 487 U.S., at 296.

> markedly once an accused even requests the assistance of counsel. [citing *Jackson*, 475 U.S., at 629-30]." *Patterson*, 487 U.S., at 290 n.3.

The first sentence of that footnote means only that "retention or acceptance of a lawyer gives rise to the substantive Sixth Amendment safeguards of *Maine v. Moulton* [citation omitted]." *Montoya v. Collins*, 955 F.2d 279, 283 (CA5 1992). It does not address what constitutes an invocation under *Jackson*.[11]

Patterson did not alter *Jackson*'s requirement that an accused invoke his right to counsel. To the contrary, *Patterson* reaffirmed *Jackson*'s assertion rule. *See Patterson*, 487 U.S., at 291. Moreover, this Court has uniformly declared, before and after *Patterson*, that an accused must affirmatively request counsel to trigger *Jackson*, and also that a represented accused may unilaterally waive his right to counsel and speak to police. *See* Petitioner's Brief, at 43 (collecting cases); *see also Harvey*, 494 U.S., at 352.[12] Additionally, *McNeil* did not "infer" an invocation of *Jackson* from the fact that a defendant had counsel at an initial appearance. Defense amici, at 8 (citing *McNeil*, 501 U.S., at 173). The defendant in *McNeil* contended as much, but the Court did not decide the issue because it was unnecessary to resolve the case. *See McNeil*, 501 U.S., at 175-76.

Finally, *amici* misrepresent the record when they erroneously contend that the police misled Ridley about their

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[11] *Accord State v. Carter*, 664 So.2d 367, 377, 380 (La. 1995). *Contra Dew v. United States*, 558 A.2d 1112, 1116 (D.C. 1989); *Holloway v. State*, 780 S.W.2d 787, 795-96 (Tex. Crim. App. 1989).

[12] *Harvey* does not, as Cobb implies, conclude that simply having defense counsel invokes *Jackson*. Respondent's Brief, at 8. In *Harvey*, the state conceded a violation of *Jackson*. 494 U.S., at 349. The Court therefore did not address the invocation issue, nor does it appear from the facts of *Harvey* how the defendant invoked his right to counsel. *Id.*, at 346.

suspicions of Cobb. Defense amici, at 9; *see also id.*, at 27 n.7. This assertion is completely unsupported by the record. Ridley himself declined to testify that the police had misled him. Pet., at B-13. When Ridley was told that Cobb had confessed to the murders, Ridley did not complain that their attorney-client relationship had been "violated." Instead, Ridley candidly told the police that he didn't even know if he would be appointed to represent Cobb for the murders. Pet., at B-10.

Ridley himself repeatedly limited his representation of Cobb to the charged burglary alone. Pet., at B-2 to B-3, B-10 to B-11, B-12. While stating that he permitted police to question Cobb about the disappearances "believing he wasn't a suspect," Pet., at B-6, Ridley also confirmed that the police "always said they thought [Cobb] knew more than he was saying." Pet., at B-7; *see* Pet., at B-3. Furthermore, even if Ridley was confused about the police's suspicions, the confusion ended a full two months before Cobb confessed. According to Ridley, in September 1995, Walker County Sheriff Meyers told him that "he thought Cobb was a suspect all along. [Meyers] flat out told me he thought Cobb was guilty; he just couldn't prove it." Pet., at B-7; *see* Pet., at D-5 ¶17.

Amici's objection that the police's behavior "deprived" Cobb of his right to Ridley's guidance in dealing with the murder investigation, Defense amici, at 9, is also contradicted by the record. Ridley himself described the "guidance" he offered in an interview with Cobb and his father: "I gave [Cobb] my business card and told them if they were contacted by anyone, to get in touch with me." R.3.472; *see* Pet., at D-6 ¶19. But when Cobb was later questioned about the murders, he declined Ridley's advice and "never invoked his right to counsel at any time." *See* Pet., at D-3 ¶8.

That undisputed fact—that Cobb never invoked his right to counsel during custodial interrogation—is the beginning and

end of this case. Even if Cobb had a Sixth Amendment right to counsel at the time he was questioned, he simply declined to use it. Nor did he elect to end the interrogation by asking to see his attorney, even though Ridley had explicitly advised him to do so. Instead, Cobb did what has never been disputed in this case. He voluntarily confessed to two cruel murders, for which he was properly convicted.

CONCLUSION

The Court should reverse the decision of the Texas Court of Criminal Appeals.

Respectfully submitted,

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